SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1967

No. 302

BERNARDO PENORO,

Plaintiff,

against

REDERI A/B DISA and vessel DISA, her motors, engines, boilers, gear and tackles,

Defendants.

REDERI A/B DISA,

Defendant and Third-Party Plaintiff-Petitioner,

against

CUNARD STEAMSHIP COMPANY, LTD.,

Third-Party Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Statutes Involved

In addition to 28 U.S.C. §1292(a)(1) cited by Petitioner, this case involves §3 of the Federal Arbitration Act, 9 U.S.C. §3, which authorizes the granting of a stay pending arbitration and which is set forth below in pertinent part at page 9.

ARGUMENT

I

The holding of the Court of Appeals is in no way contrary to this Court's order of July 1, 1966, effecting unification of civil and admiralty procedures.

Petitioner is flatly erroneous in contending that prior to unification, appealability of a stay under §3 of the Arbitration Act, 9 U.S.C. §3, depended on whether the action being stayed was brought under the Rules of Civil Procedure as opposed to the Admiralty Rules. Both legal and equitable actions are tried under the Civil Rules, yet a stay granted in an equitable action is *not* appealable, despite the Civil Rules. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955). Even a surface glance thus shows that application of the Civil Rules has nothing to do with appealability.

The fact that a stay of an action at law is appealable results not from any rules of procedure but rather from the fiction that a single federal district judge constitutes three separate "courts"—law, equity and admiralty—even though he holds but one appointment and sits in a single courtroom. Appellate jurisdiction under 28 U.S.C. §1292(a)(1) applies only to injunctions, and as the Court of Appeals correctly pointed out below, a stay of court proceedings can be treated as an injunction only if it is directed at proceedings in some court *other than the court issuing the stay* (Opinion, 6a). Under the "separate courts" fiction, this means that a stay issued against an action at law can be treated as an injunction if issued by the equity side of the court. However, if the stay can

be granted by the law side itself, then the order is *not* an injunction issued by one court against proceedings in *another* court. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 381-382 (1935).

In *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, decided January 7, 1935, an action on the law side of a district court had been stayed pursuant to §3 of the Arbitration Act. This Supreme Court ruled that the stay required an exercise of the court's equitable jurisdiction and was therefore appealable as an injunction. Almost simultaneously, the same bench of this Supreme Court decided *Schoenamsgruber* v. *Hamburg Line*, 294 U. S. 454 (March 4, 1935), where an action in admiralty was stayed pursuant to §3 of the Arbitration Act. The Supreme Court here ruled that the district judge had the power to issue the stay *in his capacity as a court of admiralty.* Therefore, the stay was *not* directed against proceedings in another court but rather against proceedings on the issuing court's own docket. As such, it was not an injunction under the *Enelow* doctrine and hence was not applicable.

Since a stay is treated as an injunction only if directed against proceedings in another court, the only question here is whether unification of the Civil and Admiralty Rules somehow restricted the power of an admiralty court to stay its own proceedings, so that resort to a different side of the court would be required to obtain the stay. The answer to this question, and to this petition for certiorari, is set forth plainly and unmistakably in the unified rules themselves. The Advisory Committee's Note to Supplemental Rule A flatly states that the unified rules are *not* intended to restrict the previously held powers of the admiralty side of the court:

> "* * * these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adopt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action."

This portion of the Note was added at the request of the Committee on Supreme Court Admiralty Rules of the Maritime Law Association so as to specifically prevent any inference that unification was intended to restrict the power of an admiralty court. See Record on Appeal, Affidavit of John W. Castles 3d of February 3, 1966 in support of motion to dismiss appeal for lack of jurisdiction.

Petitioner ignores all of this and rests his argument solely on the premise that Rule 65 now makes injunctive power available in admiralty proceedings. Even if this premise were true (Rule 65 does not confer injunctive power but merely regulates its use when it is otherwise available), it is wholly irrelevant. *Schoenamsgruber* held more than thirty years ago that an admiralty court had the power to stay proceedings before it. See also *Kulukundis Shipping Corp.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 987 (2nd Cir. 1942). The fact that an admiralty court may be given general injunctive power as well does not alter the fact that a stay in admiralty is issued by the admiralty court against proceedings on its own calendar, not against proceedings *in another court.* Such a stay is not an injunction. *Enelow* v. *New York Life Ins. Co., supra.* Even if the district court below, sitting in admiralty, had possessed injunctive power, the situation would be unchanged. In *Baltimore Contractors, Inc.* v.

Bodinger, supra, a stay issued by a court of equity against proceedings *on its own calendar* was not an injunction, even though the court of equity clearly possessed injunctive power.

Furthermore, the mere fact of unification of the Civil and Admiralty Rules did not remove the basic procedural and jurisdictional differences between the law and admiralty sides of the court. In fact, the new rules not only preserved these differences but did so consciously and with full intent. Under Rule 9(h), specific provision is made for claims which are within the admiralty and maritime jurisdiction, so that certain special procedures may be applied. The Advisory Committee's Note to Rule 9(h) states in part:

> "Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a cival action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. §1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of

citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

"It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly, as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory, and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear."

As Rule 9(h) points out, certain of the unified rules apply *only* to cases which are on the admiralty side of the court, namely Rules 14(c), 26(a), 38(e), 73(h), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. There is, therefore, absolutely no basis for arguing that unification was intended to remove all procedural differences between law and admiralty.

Significantly, one of the distinctions specifically preserved is the provision in 28 U.S.C. §1292(a)(3) for appeals from certain interlocutory orders in admiralty only. Rule 73(h). This fact, together wtih the general

statement in the Advisory Committee Note above—"* * * there is no disposition to change the present law as to interlocutory appeals in admiralty * * *"—specifically negates any possible inference that the mere fact of unification was intended to place interlocutory appeals in law and admiralty on a completely equivalent footing.

Furthermore, in *Baltimore Contractors, Inc.* v. *Bodinger, supra,* this Court rejected the opportunity to establish a uniform rule for appealability of stays under §3 of the Arbitration Act. This Court stated that the differences in appealability were illogical, but that at this late stage it was for Congress to provide uniformity. It is therefore highly unlikely that the Advisory Committee and this Court intended to silently provide a uniform rule through unification, in derogation of this previously expressed policy.

II

The stay of a suit in admiralty pending arbitration should not be appealable as an injunction.

As a matter of policy, this Court should not extend to admiralty cases the rule of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449 (1935), since that case improperly construed §3 of the Arbitration Act. As noted above, *Shanferoke* held that a stay of proceedings at law under §3 was similar to the stay involved in *Enelow* v. *New York Life Insurance Co., supra,* and entailed the exercise of equity jurisdiction. Unfortunately, this jurisdictional point had not been raised in the Court of Appeals, nor had it been raised in the briefs and oral argument before the Supreme Court. See 293 U. S. at 451. Had proper consideration been given, it would

have been clearly seen that a stay of legal proceedings under §3 does *not* invoke the equity jurisdiction but is rather "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it * * *." *Enelow* v. *N. Y. Life Ins. Co., supra,* at 381-382.

At common law, courts of equity would not enforce an executory agreement to arbitrate and hence would not stay proceedings at law in order to permit arbitration. This was clearly recognized by Congress when it passed the Arbitration Act:

> "* * * it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had.
>
> * * * * * *
>
> "Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules * * *." S. Rep. No. 536, 68th Cong. 1st Session, p. 2.

See also Story, *Equity Jurisprudence* §670, *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed. 1006 (S.D.N.Y. 1915), *Aktieselskabet Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten,* 232 Fed. 403, 405 (S.D.N.Y. 1916), *The Eros,* 241 Fed. 186, 191 (E.D.N.Y. 1916).

Statutory authority was required to enforce arbitration agreements, and the first English statute enabling a party to obtain a stay over the objection of another party (17

& 18 Vict. c. 125, 1854), passed when England still had separate courts of law and equity, makes it absolutely clear that the stay of an action at law was obtained from the court of law itself and not from a court of equity:

> "XI Whenever the parties to any Deed or Instrument in Writing * * * shall agree that any then existing or future Differences between them * * * shall be referred to Arbitration, and any One or more of the Parties so agreeing * * * shall nevertheless commence any Action at Law or Suit in Equity against the other Party * * * it shall be lawful for the Court *in which such Action or Suit is brought* * * *, on Application by the Defendant * * * to make a Rule or Order staying all Proceedings in such Action or suit * * *" (emphasis added).

In 1889 the Arbitration Act "amending and consolidating the Enactments relating to arbitration" was passed (52 & 53 Vict. c. 49), and the wording was changed to read as follows:

> "4. If any party to a submission * * * commences any legal proceedings in *any* court against any other party to the submission * * * with respect to any matter agreed to be referred, any party to such legal proceedings may * * * apply to *that court* to stay the proceedings * * * (emphasis added).

This English statutory scheme was the model for early arbitration acts in this country, as the previous quotation from Senate Report No. 536, 68th Cong. 1st Session, shows. Thus, the language of §3 of the federal Arbitration Act provides:

> "If any suit or proceeding be brought *in any of the courts* of the United States upon any issue referable to arbitration under an agreement in writing

> for such arbitration, the court *in which such suit is pending* * * * shall on application of one of the parties stay the trial of the action until such arbitration has been had * * *" (emphasis added).

It is therefore clear that a stay under §3 of the Arbitration Act is a "stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it * * *." *Enelow* v. *N. Y. Life Ins. Co., supra,* 381-82. As such, it should not have been treated as an injunction under the *Enelow* rule and should not be appealable under §1292(a)(1) of the Judicial Code. This was the position taken by the Supreme Court in *Schoenamsgruber* v. *Hamburg Line, supra,* with respect to suits in admiralty, and in *Baltimore Contractors, Inc.* v. *Bodinger, supra,* with respect to suits in equity. These cases were correctly decided, and they should not be overruled by extending the mistaken rule of *Shanferoke.*

Furthermore, the policy of automatic appeals as of right from stays such as this tends to undermine the Congressional policy of promoting the swift and inexpensive resolution of disputes through arbitration, as well as the general policy limiting appeals to final orders, with only specified exceptions. Discretionary appeal is available under 28 U.S.C. §1292(b) for any interlocutory orders which warrant immediate appeal. Significantly, petitioner originally attempted to appeal under §1292(b), but the Court of Appeals denied leave to appeal. No useful purpose is served by permitting additional appeal of interlocutory stays which are of insufficient merit to warrant appeal under §1292(b). The only effect would be to impose an additional burden on the parties and the courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

July 26, 1967

Respectfully submitted,

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